No. 83-2145

IN THE

Supreme Court of the United States

October Term, 1983

NAVIOS CORPORATION, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ETC.

Respondent.

On Petition For a Writ of Certiorari To
The United States Court of Appeals
For The Eleventh Circuit

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ARGUMENT IN REPLY

The BLACKTHORN[1] argues that certiorari should be denied because: (1) Claimants are estopped from relitigating the legal issue of whether Robins[2] bars recovery of economic losses absent impact; (2) there is no conflict between the circuits; and (3) this Court has once denied certiorari on the issue presented by the petition.[3] None of these arguments have merit.

Collateral estoppel does not apply to the pure legal issue presented by the peti-

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[1] Claimants will adhere to the abbreviations utilized in their Petition for Writ of Certiorari. "Mem." will refer to the BLACKTHORN's memorandum in opposition to the Petition.

[2] Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

[3] Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir.), cert. denied, 458 U.S. 1108 (1982).

tion; the BLACKTHORN has misread the cases it cites to demonstrate uniformity between the circuits; and in the two years since this Court denied certiorari in Kingston, the confusion over the application of Robins to the economic damages asserted here has never been more apparent. The writ of certiorari should be granted to end that confusion and restore uniformity between the circuits.

I. COLLATERAL ESTOPPEL DOES NOT BAR CLAIMANTS FROM SEEKING THE ELEVENTH CIRCUIT'S RECONSIDERATION OF THE ECONOMIC LOSS ISSUE.

Two separate limitation of liability proceedings arose out of the collision between the BLACKTHORN and the S/S CAPRICORN. In the first, (the CAPRICORN's petition for limitation of liability), Claimants asserted that they were entitled

to recover delay damages from the CAPRICORN because the channel was blocked by the CAPRICORN's negligence. As to the Claimants, that proceeding ended when this Court declined to review the Eleventh Circuit's determination that Robins barred recovery of economic loss absent physical injury. In the second, (the BLACKTHORN's separate limitation proceeding), Claimants asserted their right to recover delay damages based on the BLACKTHORN's negligence. The BLACKTHORN now argues that collateral estoppel prevented the Claimants from seeking the Eleventh Circuit's reconsideration of the economic loss issue in the second proceeding.

The BLACKTHORN's argument should be rejected. Collateral estoppel was not raised by the BLACKTHORN until the Eleventh Circuit granted rehearing en banc to reconsider the economic loss issue. The

BLACKTHORN's failure to raise the argument in the district court and before the original Eleventh Circuit panel is grounds enough to reject its assertion here. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

But even if the BLACKTHORN's argument is considered at this late stage, it is without merit. The Eleventh Circuit was bound, not by estoppel, but rather by principals of stare decisis.[4] A court always has the power[5] to correct errors made on

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[4] Thus, the BLACKTHORN's statement that the Eleventh Circuit panel was "controlled" by the result in Kingston is misleading (Br. 2). An Eleventh Circuit rule (not collateral estoppel) prevented the second three-judge panel from overruling the first.

[5] The Eleventh Circuit court recognized it had the power to retreat from the rule announced in Kingston. It granted a rehearing en banc for the very purpose of revisiting the economic loss issue. Apparently, the Eleventh Circuit rejected the

pure questions of law, even in a subsequent proceeding where there is mutuality of parties:

> The contention of the government seems to be that the doctrine of res judicata does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has ennunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

United States v. Moser, 266 U.S. 236 (1924). Thus, unless the parties and the claims are identical in the two

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government's collateral estoppel argument. Both this case and the related case arising out of the skyway bridge disaster, Hercules Carriers, Inc. v. Florida, 720 F.2d 1201 (11th Cir. 1983), were decided by identical six-to-six votes even though no collateral estoppel issue was presented in Hercules Carriers.

proceedings, the application of collateral estoppel would not only be "manifestly unjust" but would also stifle the growth of the law and prevent the correction of legal errors. See Montana v. United States, 440 U.S. 147, 162-63 (1979).

Claimants' action against the BLACKTHORN is entirely separate from the CAPRICORN proceeding and thus represents a different claim or demand. See Commissioner v. Sunnen, 333 U.S. 591 (1948); Divine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974). When a separate claim is involved, collateral estoppel will not bar the relitigation of a legal issue even if the facts underlying the claims are identical. Sunnen, 333 U.S. at 906-07 (res judicata or collateral estoppel were "not meant to create rights in decisions that have become obsolete or erroneous with time").

When, as in this case, different parties are involved in the second proceeding, there is even less reason to apply collateral estoppel. The policy supporting the correction of judicial error no longer conflicts with the desire to promote finality in litigation between specific parties. See Restatement (Second) of Judgments § 29(7). According to Section 29(7), reconsideration of legal issues in subsequent litigation with others is not precluded where:

> The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based.

An analogous circumstance was addressed by the Second Circuit in Divine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974). In Divine, a corporation distributed dividends and advised its shareholders

that the dividends were non-taxable. The IRS sued two of the corporation's shareholders in separate actions asserting that the dividends were in fact taxable. The appellate court's ruling in favor of the taxpayer in the first suit did not collaterally estop the IRS from relitigating the legal issue in a subsequent action against another shareholder even though the underlying facts were identical.[6]

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[6] The decision is Divine was based in part on the Second Circuit's recognition that review by certiorari in this Court is far from automatic. If the Eleventh Circuit was foreclosed by collateral estoppel from correcting its legal errors en banc, there would often be significant delay in the correction of those errors and the establishment of uniformity by this Court. See Divine, 500 F.2d at 1048-49. In this case, of course, that error correction mechanism has failed because of the Eleventh Circuit's 6-6 deadlock. Relief for the instant Claimants and indeed for all delay claimants in the Eleventh Circuit can come only from this Court.

II. THERE IS A CONFLICT BETWEEN THE CIRCUITS OVER THE PROPER APPLICATION OF ROBINS TO DELAY CLAIMS.

The BLACKTHORN cites five cases for the proposition that the courts of appeals "have consistently followed the general rule applied in Robins" (Mem. 4). Four of those cases arose in the Fifth Circuit which is now questioning the correctness of those decisions en banc. See State of Louisiana ex rel. Guste v. M/V TESTBANK, 728 F.2d 748 (5th Cir. 1984), reh. en banc granted, (May 14, 1984).[7] The fifth case, Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc., 638 F.2d 700 (4th Cir. 1981), directly conflicts with precedent in the First, Second, Seventh, and Ninth Circuits. In its attempt to

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[7] Oral argument before the Fifth Circuit en banc occurred September 11, 1984.

"smooth over" this conflict, the BLACKTHORN misreads the Seventh Circuit precedent, erroneously distinguishes First and Second Circuit precedent, and ignores precedent in the Ninth Circuit.

In Chicago & WIRR v. Motorship BUKO MARU, 1974 A.M.C. 2287 (N.D. Ill. 1973), aff'd, 505 F.2d 579 (7th Cir. 1974), contrary to the BLACKTHORN's assertion (Mem. 4 n.4), the court permitted the recovery of economic losses by railroads that had no ownership interest in the bridge or the corporation that owned the bridge. 1974 A.M.C. at 2287-88. Moreover, the court specifically held that Robins did not bar recovery of the railroads' delay losses and distinguished the Fifth Circuit precedent relied upon by the BLACKTHORN. Id. at 2289-2290. The judgment was affirmed in all respects by the Seventh Circuit. 505 F.2d 579.

As to the precedent in the First Circuit, the BLACKTHORN points out that in In re Petition of Boat Demand, Inc., 174 F. Supp. 668 (D. Mass. 1959), the explosion that caused the defendant's vessel to sink and block claimant's dock hurled debris that damaged claimant's building. Despite the physical damage, the court recognized that the obstruction was a separate actionable tort. 174 F. Supp. at 670. There is nothing in the opinion that reveals that recovery was dependent upon the physical damage. Id.

Moreover, the BLACKTHORN's focus on the incidental physical loss suffered by the claimant in Boat Demand exposes the arbitrariness of its position. According to the BLACKTHORN, had the debris missed claimant's building, Claimant's delay damages (which were a substantial portion of its recovery) would have been entirely

foreclosed despite the fact that under the traditional tort principles of proximate causation and foreseeability, the delay injury would have been identical whether or not there was physical damage. Recovery should not depend on the fortuity of physical impact.[8]

In Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), the Ninth Circuit clearly permitted the recovery of economic

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[8] The government argues that New York, N.H. & H.R. Co. v. Piscataqua Navigation Co., 108 F. 92 (1st Cir. 1901) was decided before Robins and is no longer good law. Of course, such an argument presumes that Robins held that economic losses are unrecoverable absent physical damage. That presumption is precisely the issue in this case. Regardless when it was decided, Piscataqua, which is factually indistinguishable from the instant case, demonstrates the fact that the circuits are split in their assessment whether economic delay damages are recoverable absent impact. Whether Piscataqua was right or wrong is the issue that deadlocked the Eleventh Circuit and now must be resolved by this Court.

losses absent physical damage. The BLACKTHORN calls this case "different" but the fact is, the Ninth Circuit rejected precisely what the BLACKTHORN urges here -- a blanket application of Robins to bar economic loss recovery. Id. at 564-71. Instead the Ninth Circuit examined the underlying elements of the tort action and determined that the relationship between the plaintiff and defendant was adequate to support the existence of a duty of care. Claimants seek nothing more than a similar application of traditional tort principles to this case.[9]

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[9] Similarly, the Second Circuit rejected a blanket application of Robins as a ground to prohibit the recovery of economic losses. In Re Petition of Kinsman Transit Co., 388 F.2d 821, 823-24 (2d Cir. 1968).

III. SINCE THIS COURT DENIED CERTIORARI IN KINGSTON, THE CONFUSION BETWEEN THE CIRCUITS HAS NEVER BEEN MORE APPARENT.

Despite the BLACKTHORN's statement that nothing has happened since this Court denied certiorari in Kingston, the fact is, the confusion over the correct application of Robins has increased rather than decreased in the last two years. The Eleventh Circuit has considered the issue en banc and is deadlocked on the correct application of Robins. Judge Wisdom of the Fifth Circuit now argues that the Fifth Circuit was wrong in applying Robins to foreclose recovery of economic losses without impact. At Judge Wisdom's suggestion, the Fifth Circuit is now rehearing the issue en banc. These decisions can only add fuel to the fire already stoked by conflict between the rest of the circuits

on the correct application of Robins. This Court should grant the petition for writ of certiorari and end that confusion by clarifying that Robins does not apply to foreclose recovery of economic losses absent physical impact.

CONCLUSION

For all the foregoing reasons, claimants respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Eleventh Circuit Court of Appeals, en banc.

Respectfully submitted,

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